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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1975

No. **75-1459**

JOHN F. SINGER, and all other
persons similarly situated,

Petitioner,

—v.—

UNITED STATES CIVIL SERVICE COMMISSION, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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UNITED STATES CIVIL SERVICE COMMISSION,
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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner John F. Singer prays that
a writ of certiorari issue to review the
judgment of the United States Court of
Appeals for the Ninth Circuit affirming a
summary judgment of dismissal rendered by
the United States District Court for the
Western District of Washington.

OPINIONS BELOW

The opinion of the Court of Appeals, which is unreported, is set out in the Appendix, infra, p. 1a. The order of the District Court, which is unreported, is set out in the Appendix, infra, p. 16a. A letter informing counsel of the reasons for the decision is set out in the Appendix, infra, p. 17a. The decision of the Civil Service Commission Board of Appeals and Review is set out in the Appendix, infra, p. 19a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's discharge from the Equal Employment Opportunity Commission as a clerk-typist because of his non-criminal public activities seeking recognition of the rights of homosexuals was in violation of the First Amendment.

2. Whether petitioner's discharge because of these activities was in violation of his constitutional right of privacy guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments.

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. §3301:

Civil service; generally

The President may--

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought;

. . . .

5 C.F.R. §731.201: ^{1/}

Reasons for disqualification

. . . [T]he Commission may deny an applicant examination, deny an eligible employment, and instruct an agency to remove an appointee for any of the following reasons:

. . . .

^{1/} This section was amended after petitioner's discharge. See App., infra, pp. 12a-13a, nn. 14, 15; 40 Fed. Reg. 28047-48 (July 3, 1975).

(b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;

. . . .

STATEMENT OF THE CASE

Petitioner was hired on probationary status as a clerk-typist by the Seattle office of the Equal Employment Opportunity Commission ("EEOC") on August 2, 1971. At that time, he informed the EEOC district director that he was a homosexual. Petitioner's performance on the job was rated as "superior" or "very good" in all aspects by the district director. Singer was particularly cited for his "ability to rapidly develop rapport with people in minimum time," his dependability, and his "good initiative and judgment." His supervisor noted no factors which might interfere with his "progress of development" (AR. 94-95).^{2/} In the opinion of all of Singer's co-workers, his competency and job performance were "outstanding," and they professed "great respect for him." Moreover, according to petitioner's co-workers, "[t]here is absolutely no evidence that [petitioner] has ever offended a member of the public in his

^{2/} The designation "AR. ____" indicates page references to the administrative record. The designation "R. ____" indicates page references to the record on appeal to the Court of Appeals.

duties in this office. As a matter of fact, his dedication to Title VII and the concepts behind it have been recognized by Charging Parties a number of times" (AR. 98). Singer had been hired at the GS-IV level, but within a few months passed the examination and was placed in the register for GS-VII positions (R. 43). Petitioner had also served almost two years as an Army medical corpsman and was honorably discharged (AR. 30).

Despite this faultless work record, petitioner was informed by letter dated May 12, 1972, that investigation by the Civil Service Commission ("Commission") had revealed "adverse information" on his "suitability for employment in the competitive Federal service" (R. 51). After administrative proceedings and appeals, the Commission ordered petitioner to be fired, and he left federal employment on January 6, 1973. Petitioner then brought this suit to challenge the Commission's action.

The Board of Appeals and Review of the Commission, the highest administrative level of appeal, stated its conclusions supporting petitioner's removal from service:

There is evidence in the file which indicates that [petitioner's] actions establish that he has engaged in immoral and notoriously disgraceful conduct, openly and publicly flaunting

his homosexual way of life and indicating further continuance of such activities. Activities of the type he has engaged in are such that general public knowledge thereof reflects discredit upon the Federal Government as his employer, impeding the efficiency of the service by lessening general public confidence in the fitness of the Government to conduct public business with which it is entrusted (App., infra, p. 22a).

There is no claim and no evidence that petitioner ever engaged in any criminal acts. Rather, the decisions below were all based upon petitioner's lawful attempts to achieve public acceptance and recognition of homosexual relationships. The Commission investigator relied upon eight specific charges to reach the conclusion that petitioner's "activities in these matters are those of an advocate for a socially repugnant concept" (AR. 17):

(1) During his employment with a San Francisco firm, a job which ended more than a year before the findings were made, Singer had kissed a man in the company cafeteria and kissed and embraced a man in the elevator lobby.

(2) In a brief quotation, published without naming his employer, in an "Inquiring

Photographer" column in a San Francisco newspaper in November 1970, Singer stated he was a homosexual and gave his views on "closet queens."

(3) Singer openly admitted he was "gay" at the Seattle EEOC office and indicated he considered homosexual activity "appropriate" and intended "to continue it as a way of life."

(4) Singer applied for a license to marry another man. He appealed its administrative denial to state courts, where his constitutional claims were rejected. 3/

(5) The attempt to obtain a marriage license was the subject of a local television news report and of several articles in Seattle papers.

(6) In two newspaper articles on the marriage license story, Singer was identified as a typist for the EEOC. In an affidavit submitted to the Commission, Singer said that he was so identified "without [his] specific authorization" (R. 54). Singer was

3/ A judge of the Superior Court refused to issue an order to show cause why the license should not be issued. An appeal was unsuccessful. Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974). The Washington Supreme Court denied a petition for review.

quoted as saying, in part, that the couple were "two human beings who happen to be in love and want to get married for various reasons."

(7) Singer was actively involved in the homosexual movement in Seattle. He was an organizer, leader and member of the board of directors of the Seattle Gay Alliance, Inc. He was a guest on a radio "talk show" in support of the Seattle Gay Community Center. He displayed homosexual slogans on his private automobile. Singer was listed with his place of employment as being involved in the planning and conducting of a symposium presented by the Gay Community Center entitled "A New Approach Toward Mental Health and Civil Rights for Sexual Minorities." Singer's affidavit stated that his place of employment was identified without his knowledge or consent (R. 54).

(8) Singer sent a letter to the Seattle Regional Training Center of the Commission which said in part, "I work for EEOC, and am openly gay" Singer explained that he wrote this letter in response to an announcement by the Commission of a training session to sensitize federal employees to the problems of "all minority group members" (emphasis in original) (Reply brief in Court of Appeals at 7), protesting the fact that the homosexual minority was not included.

Thus of the eight charges, the first

two concerned acts distant in time and place from petitioner's EEOC employment. All of the charges involved various forms of expressive and associational activity protected by the First Amendment. Only one involved incidents occurring at the EEOC.

This action was commenced to seek review of the Commission's determination. Without holding a hearing, the District Court granted respondents' motion for summary judgment of dismissal. The District Judge informed the parties of his decision in a letter from his law clerk stating that the Judge, upon review of the administrative record which had been filed with the Court, "concluded that there was substantial evidence to support the agency's findings and conclusions" (App., infra, p. 17a). A brief order prepared by government counsel was signed the following day (App., infra, p. 16a). On appeal, the Ninth Circuit agreed that there was substantial evidence to support the Commission's decision. The Court of Appeals based its decision on the theory that petitioner's discharge was a result of his "'openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities,' while identifying himself as a member of a federal agency" (App., infra, p. 13a). The Court found that the Commission could rationally conclude that "general public knowledge [of petitioner's activities] reflects discredit upon the federal government as his employer, impeding the efficiency of the service by lessening public confidence

in the fitness of the Government to conduct the public business . . ." (App., infra, pp. 13a-14a). 4/ The Court also rejected petitioner's claim that the First Amendment protected his advocacy of homosexuality, finding that the Commission could properly conclude that the governmental interest in "efficiency" of service outweighed petitioner's interest in exercising First Amendment rights in the manner in which he had done.

4/ At the time of petitioner's discharge, Civil Service Commission regulations permitted termination on the basis of "immoral" acts, which included homosexuality. The Commission has since changed its regulations, removing immorality and homosexuality per se as a basis for discharge. The Court of Appeals decided the case under the old regulations. See App., infra, pp. 12a-13a. But it seems clear that petitioner would be discharged under administrative construction of the new regulation, as well as under the prior regulation. As the Court of Appeals points out, guidelines adopted pursuant to the new regulation allow discharge where an employee's "sexual conduct affects job fitness" (App., infra, p. 12a-13a n. 15). "Job fitness" was the basis for petitioner's discharge here.

REASONS FOR GRANTING THE WRIT

This case involves the important question whether the government may, while claiming not to discriminate against homosexuals in employment, nevertheless discharge a homosexual employee for engaging in wholly noncriminal, nonpartisan activity otherwise protected by the First Amendment, simply because it involves advocacy of the rights of homosexuals.

The Court has been sensitive to the First Amendment rights of government employees, and this case presents an opportunity to reinforce those decisions by holding that an employee's advocacy of a socially unpopular cause may not be grounds for discharge. Moreover, a favorable decision in this case would demonstrate a sensitivity to the problems of homosexuals, who form a substantial minority of American citizens.

1. The decision below ignores pertinent principles of First Amendment law and conflicts with the decision of the Court of Appeals for the Fourth Circuit in Acanfora v. Board of Education, 491 F. 2d 498, 500-01 (4th Cir.), cert. denied, 419 U.S. 836 (1974). In effect, the decision below approved the discharge of petitioner because he was "an advocate for a socially repugnant concept." Yet there is no evidence in the record that petitioner's advocacy on behalf of the rights of homosexuals ever had any impact remotely approaching "incitement to imminent lawless

action." Brandenburg v. Ohio, 395 U.S. 444 (1969); Healy v. James, 408 U.S. 169 (1972).

Petitioner was discharged because he engaged in a number of entirely lawful and non-partisan activities in which he sought to win public and legal recognition for the rights of homosexuals. He sought to challenge the prohibition on homosexual marriages by applying for a license to marry another man. When this was denied, he sought judicial review. Under the rationale of the decision below, the petitioners in Loving v. Virginia, 388 U.S. 1 (1967), could have been fired, had they been federal employees, because they were involved in a judicial challenge to a prohibition of interracial marriages. When the news media were predictably attracted to his attempted marriage, petitioner sought to explain his actions and to generate public support for a minority viewpoint. Cf., e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Singer engaged in traditionally protected associational activities in the Seattle Gay Alliance, seeking changes in laws and social attitudes. Cf., e.g., NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963). Petitioner did not attempt to conceal his homosexual lifestyle from his fellow workers or the public. Rather, he frankly admitted it and, according to the uncontradicted evidence, offended no one with whom he dealt.

The decisions below characterize these activities as "flaunting" and "broadcasting"

petitioner's homosexual activities. However they may be characterized, they are protected by the First Amendment irrespective of the constitutional status of homosexuality. That is, the First Amendment protects advocacy of all ideas, not merely those which conform to established orthodoxies. E.g., Cohen v. California, 403 U.S. 15 (1971); Terminiello v. Chicago, 337 U.S. 1 (1949). Homosexuality is a matter of public interest and wide discussion, and an employee may not be penalized for his participation in that discussion. This was recognized by the Fourth Circuit in Acanfora v. Board of Education, *supra*, a decision in conflict with that of the Ninth Circuit in this case, and of the Eighth Circuit in McConnell v. Anderson, 451 F. 2d 193 (8th Cir. 1971), cert. denied 405 U.S. 1046 (1972).

The Court of Appeals stated that it was applying the balancing test enunciated in Pickering v. Board of Education, 391 U.S. 563 (1968), to ascertain the First Amendment rights of petitioner as a government employee (App., *infra*, pp. 7a-8a). The Court committed grave error, however, in concluding that the Commission properly struck the balance against petitioner's rights. The decisions below rest on the proposition that there is a governmental interest in preventing employees from "publicly flaunting and broadcasting . . . homosexual activities" (App., *infra*, p. 15a). Such a regulatory interest turns on the specific content of the speech activity, homosexuality. Yet

this Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department v. Mosley, 408 U.S. 92, 95 (1972).

The fact that publicity regarding homosexuality may be unpleasant or embarrassing to some persons does not relieve the Commission of its burden in separation proceedings to produce evidence that actual impairment of the efficiency of the federal service was caused by the employee's actions. Norton v. Macy, 417 F. 2d 1161 (D.C. Cir. 1969). There is no such evidence in this case, and it seems clear that the Commission would consider any public activity on behalf of homosexual rights to be adequate grounds for discharge. Reversal of the Commission's decision in this case would not mean that federal employees could not be fired if they engaged in public or otherwise criminal sexual acts. It would, however, make it clear that civil servants need no longer fear job reprisals as a result of revealing their sexual preferences or of advocating acceptance and legitimization of homosexual relationships.

2. Although the Commission, since its actions in this case, has changed its regulations under court order so that homosexuality per se is no longer a disqualification for employment, see App., infra, pp. 12a-13a, nn. 14, 15, its decision here effectively nullifies

that constitutionally mandated change. Petitioner's discharge for "flaunting" and "advocacy" of homosexual rights is an attempt to achieve circuitously a result--the discharge of a homosexual--which even the Commission recognizes is improper. For that reason, petitioner's discharge violates the right of privacy guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments. The decision below is inconsistent with this Court's decisions in Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Roe v. Wade, 410 U.S. 113 (1973). In these cases, the Court recognized the right of privacy in sexual matters. In Eisenstadt, the Court defined this as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters . . . fundamentally affecting a person. . . ." 405 U.S. at 453.

The attempt by the Commission to punish petitioner because of his sexual preference intrudes upon his fundamental interest in living and acting in accordance with his inherent sexual orientation. It would be extremely difficult and painful to reverse petitioner's sexual preference, and his life would, of course, be profoundly affected if he were forced to do so. See, e.g., J. Marmor, ed. Sexual Inversion (1965).

Other federal courts have recognized that there is no legitimate governmental interest in denying employment to homosexuals

per se. Norton v. Macy, supra; Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 339 (N.D. Cal. 1973), aff'd in part, 528 F. 2d 905 (9th Cir. 1975). As noted above, the Commission now apparently recognizes that homosexuality per se is not a disqualification from federal employment. Yet if an employee cannot advocate or even discuss his or her sexual orientation, such a policy change becomes meaningless and homosexuals are effectively barred from federal employment.

It is unconstitutional to prevent federal employment of homosexuals because, as the cases cited above recognize, there is absolutely no basis for concluding that homosexuality per se impairs the efficiency of the government service. The decision below is little more than a transparent attempt to circumvent this constitutionally compelled conclusion.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 1976

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN F. SINGER,
and other persons similarly situated,
Plaintiff-Appellant,

vs.

UNITED STATES CIVIL SERVICE COMMISSION;
ROBERT E. HAMPTON, Chairman, U.S. Civil
Service Commission; WILLIAM P. BERZAK,
chairman, U.S. Civil Service Commission
Board of Appeals and Review; WILLIAM G.
WENDELL, Director, Seattle Region, U.S. Civil
Service Commission,
Defendants-Appellers.

No. 74-2073

OPINION

[January 12, 1976]

Appeal from the United States District Court
for the Western District of Washington

Before: CHAMBERS and KENNEDY, Circuit Judges,
and JAMESON,* District Judge.

JAMESON, District Judge:

This is an appeal from a summary judgment of dismissal of an action brought by John F. Singer, plaintiff-appellant, against the United States Civil Service Commission and certain of its officials, defendants-appellees, seeking declaratory and injunctive relief and damages for termination of Singer's employment because of his homosexual conduct. The district court held that there was "substantial evidence in the administrative record to support the findings and conclusions" of the Civil Service Commission. Both sides rely upon excerpts from that record, and particularly statements

*Honorable W. J. Jameson, United States Senior District Judge for the District of Montana, sitting by designation.

of the Commission and its officials. Accordingly we set forth the record in some detail.

Factual background

On August 2, 1971, Singer was hired by the Seattle Office of the Equal Employment Opportunity Commission (EEOC) as a clerk typist. Pursuant to 5 C.F.R. § 315.801 *et seq.*, he was employed for one year on probationary status, subject to termination if "his work performance or conduct during this period (failed) to demonstrate his fitness or his qualifications for continued employment" (§ 315.804).¹ At the time he was hired Singer informed the Director of EEOC that he was a homosexual.

On May 12, 1972, an investigator for the Civil Service Commission sent a letter to Singer inviting him "to appear voluntarily for an interview to comment upon, explain or rebut adverse information which has come to the attention of the Commission" as a result of its investigation to determine Singer's "suitability for employment in the competitive Federal service." The interview was set for May 19. Singer appeared at the appointed time with his counsel. Singer was advised that the investigation by the Commission disclosed that "you are homosexual. You openly profess that you are homosexual and you have received wide-spread publicity in this respect in at least two states." Specific acts were noted, which may be summarized as follows:

(1) During Singer's previous employment with a San Francisco mortgage firm Singer had "flaunted" his homosexuality by kissing and embracing a male in front of the elevator in the building where he was employed and kissing a male in the company cafeteria;

(2) The San Francisco Chronicle wrote an article on Singer in November of 1970 in which he stated his name and occupation and views on "closet queens";

(3) At the Seattle EEOC office Singer openly admitted being "gay" and indicated by his dress and demeanor that he intended to continue homosexual activity as a "way of life";

¹§ 315.804 provides for notice in writing as to why a probationer is "being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct."

(4) On September 20, 1971, Singer and another man applied to the King County Auditor for a marriage license, which was eventually refused by the King County Superior Court;²

(5) As a result of the attempt to obtain the marriage license Singer was the subject of extensive television, newspaper and magazine publicity;

(6) Articles published in the Seattle papers of September 21, 1971 included Singer's identification as a typist employed by EEOC and quoted Singer as saying, in part, that he and the man he sought to marry were "two human beings who happen to be in love and want to get married for various reasons";

(7) Singer was active as an "organizer, leader and member of the Board of Directors of the Seattle Gay Alliance, Inc."; his name accompanied by (his) "place of employment appeared as one of the individuals involved in the planning and conducting of a symposium presented by the Seattle Gay Community"; he appeared in a radio "talk show" and displayed homosexual advertisements on the windows of his automobile;

(8) Singer sent a letter to the Civil Service Commission about a planned symposium on employment discrimination stating in part, "I work for the E.E.O.C., and am openly Gay"

Singer was offered an opportunity to comment "regarding these matters". He did not do so. On May 22 his counsel by letter requested a citation to the Civil Service regulations under which the investigation was proceeding and any regulation related to his alleged unsuitability for employment. In a response dated May 23 the Commission stated that its authority was found in Rule 5, Section 5.2 of the Civil Service Rules and Regulations; and that the "suitability standards in Section 731.201 of the Commission's regulations" cite as disqualifying factors: "Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct".

Singer and his counsel were given a further opportunity to appear on Wednesday, May 24, to make a statement or give further information. Instead an affidavit was presented dated May

²The order was appealed. In *Singer v. Hara*, 11 Wash. App. 247, 522 P.2d 1187 (1974), the Court of Appeals of Washington affirmed the Superior Court and held that the Washington statutory prohibition against same-sex marriages did not violate any constitutional right. A petition for review was denied by the Supreme Court of Washington.

26, in which Singer stated that (1) he had read the investigative report; (2) the identification of his employment as a typist for the EEOC (6 above) was done by the newspaper without his "specific authorization"; (3) the use of his place of employment with respect to the symposium (7 above) was "not specifically authorized" by him and "was done without (his) knowledge or consent"; and (4) he saw nothing in the report "which in any way indicates that my conduct has been in violation of regulations pertaining to federal employees".

By letter dated June 26, 1972 the Chief of the Investigations Division of the Seattle office of the Civil Service Commission notified Singer that by reason of his "immoral and notoriously disgraceful conduct" he was disqualified under Section 731.201(b) of the Civil Service Regulations (5 CFR § 731.201(b)) and that his agency had been directed to separate him from the service.³

Singer appealed the decision. Following the submission of briefs, the Hearing Examiner, on September 14, 1972 upheld the decision of the Chief of the Investigations Division. In advising Singer that instructions for his removal were being renewed, the Examiner reviewed the virtually unrefuted charges against Singer and continued in part:

"In reaching a decision on your appeal, careful consideration has been given to the written representations and evidence submitted in your behalf by Attorney Christopher E.

³The reasons for the Commission's conclusion were set forth in the letter as follows:

"The information developed by the investigation, taken with your reply, indicate that you have flaunted and broadcast your homosexual activities and have sought and obtained publicity in various media in pursuit of this goal. . . . Your activities in these matters are those of an advocate for a socially repugnant concept.

" . . . In determining that your employment will not promote the efficiency of the service, the Commission has considered such pertinent factors as the potential disruption of service efficiency because of the possible revulsion of other employees to homosexual conduct and/or their apprehension of homosexual advances and solicitations; the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among youth; the possible use of Government funds and authority in furtherance of conduct offensive to the mores and law of our society; and the possible embarrassment to, and loss of public confidence in, your agency and the Federal civil service."

Young on September 7, 1972, in lieu of an opportunity for personal appearance afforded to you on that date. In pertinent part, these representations contend that your supervisor and co-workers have experienced no complaint with your performance or conduct on the job,⁴ and that your removal will not promote the efficiency of the service. The appellate representations otherwise disagree with the Commission's determination that homosexual conduct is immoral in nature and does not meet requirements of suitability for the Federal service, contending that such actions based on an individual's personal sexuality and sexual activities are violative of constitutional rights of privacy and free speech.

"However, there is more to the 'efficiency of the service' than the proper performance of assigned duties. The immoral and notoriously disgraceful conduct which is established by the evidence in your case, in our view, does have a direct and material bearing upon your fitness for Federal employment. Activities of the type you have engaged in, which has not been limited to activity conducted in private, are such that general public knowledge thereof would reflect discredit upon the Federal government as your employer, impeding the efficiency of the service by lessening general public confidence in the fitness of the government to conduct the public business with which it is entrusted. The federal government, like any employer, may be judged by the character and conduct of the persons in its employ, and it will promote the efficiency of the service to remove from its employ any individual whose detrimental influence will detract from that efficiency."

Singer appealed to the United States Civil Service Commission, Board of Appeals and Review. In a decision and order dated December 1, 1972 the Board affirmed the decision of the Regional Office dated September 14, 1972 saying in part:

"There is evidence in the file which indicated that appellant's actions establish that he has engaged in immoral and notori-

⁴In an evaluation report, Singer had been rated by his supervisor as "superior" or "very good" in various categories of job performance. A letter from his co-workers expressed the opinion that Singer had been a competent employee and that their experience with him had been "educational and positive".

ously disgraceful conduct, openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities. Activities of the type he has engaged in are such that general public knowledge thereof reflects discredit upon the Federal Government as his employer, impeding the efficiency of the service by lessening general public confidence in the fitness of the Government to conduct the public business with which it is entrusted."

On December 29, 1972 Singer filed this action on behalf of himself and other persons similarly situated, seeking injunctive and declaratory relief. The complaint was later amended to include a prayer for damages and an order restoring Singer to his Civil Service position. Summary judgment of dismissal with prejudice was entered on March 29, 1974.

Contentions of Parties

Appellant contends that he was discharged because of his status as a homosexual without the Commission showing any "rational nexus" between his homosexual activities and the efficiency of the service, in violation of the Due Process Clause of the Fifth Amendment; and that he has been denied freedom of expression and the right to petition the Government for redress of grievances, in violation of the First Amendment. The Commission argues that appellant's discharge as a probationary employee was not arbitrary, capricious, an abuse of discretion, or unconstitutional; that appellant was not discharged because of his status as a homosexual; and that appellant's repeated flaunting and advocacy of a controversial lifestyle, with substantial publicity in which he was identified as an employee of EEOC, provided a rational basis for the Commission's conclusion as to "possible embarrassment to, and loss of public confidence in (the) agency and the Federal Civil Service".

In considering these contentions, we are concerned with recent developments of the law in four related areas: (1) the extent of judicial review of agency decisions; (2) the extent of the Government's prerogative to regulate the conduct of its employees; (3) the constitutional rights of probationary employees; and (4) the dismissal of government employees for homosexual activities.

Scope of Review of Agency Action

While the concept of the scope of review of agency action in the discharge of government employees has broadened in recent years, it is still narrow. *Dennis v. Blount*, 497 F.2d 1305, 1309 (9 Cir. 1974). The applicable rule was well summarized in *Toohey v. Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970):

"Dismissal from federal employment is largely a matter of executive agency discretion. Particularly is this true during the probationary period. The scope of judicial review is narrow. Assuming that statutory procedures meet constitutional requirements, the court is limited to a determination of whether the agency substantially complied with its statutory and regulatory procedures, whether its factual determinations were supported by substantial evidence, and whether its action was arbitrary, capricious or an abuse of discretion."⁵

Right of Government to Control Conduct and Speech of Employees

As with scope of review of action of government agencies, courts are "increasingly re-examining and considering . . . to what extent the Government's prerogative to employ or discharge permits it to regulate conduct of its employees" which might otherwise violate constitutional rights. *Michan v. Macy*, 392 F.2d 822, 832 (D.C. Cir. 1968).⁶ It is well established, however, that the Government as an employer has interests in regulating the speech of its employees "that differ significantly from those it possesses in connection with regulation of the speech of the citizen in general". The problem is to arrive at the proper balance between the interests of the employee, as a citizen, and the interest of the Government, as an employer, "in promoting the efficiency of the public service it per-

⁵See, also, *Seebach v. Cullen*, 338 F.2d 663 (9 Cir. 1964), cert. denied, 380 U.S. 972 (1965); *Frommhamen v. Klein*, 456 F.2d 1391, 1393 (9 Cir. 1972).

⁶Judge Leventhal noted further:

"As Government services multiply, the liberties of Government employees come to be the liberties of an increasing and substantial portion of the citizenry, and are accordingly given increased recognition. There is a reverse side to the coin: With mounting provision of increased and increasingly indispensable services rendered by Government employees, the public weal demands administration that is effective and disciplined and not beset by turmoil and anarchy."

forms through its employees". *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

Status of Probationary Employee

As a probationary employee appellant had no right *per se* to continued employment.⁷ However, even though a person has no "right" to a valuable governmental benefit and "even though the government may deny him the benefit for any number of reasons", it "may not deny a benefit to a person on the basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech". *Perry v. Sindermann*, 408 U.S. 573, 579 (1972). Moreover, while the Civil Service Commission has wide discretion in determining what reasons may justify removal of federal employees, that discretion is not unlimited. Due process limitations in determining what reasons justify removal may apply to those whose employment is not protected by statute.

It is clear that the Civil Service Commission complied with the statutory and regulatory procedures in its investigation of appellant's conduct and in his dismissal. It is clear also that the dismissal was not based upon unfounded and unsupported charges. Appellant in effect admitted the truth of the charges.⁸ The sole question is whether the action of the Commission in dismissing appellant on the basis of the admitted charges was arbitrary and capricious, an abuse of discretion, and in violation of appellant's constitutional rights.

Dismissal for Homosexual Activities

With the foregoing principles and trends in mind, we turn to those cases which have considered homosexual activities as a basis for dismissal of Civil Service employees. The leading case is *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (opinion by Judge Bazelon, with Judge Wright concurring and Judge Tamm dissenting), where a protected civil servant sought review of his dis-

⁷See, *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Jenkins v. U.S. Post Office*, 475 F.2d 1256 (9 Cir. 1973). It is clear also that a probationary employee has "fewer procedural rights than permanent employees in the competitive service". *Sampson v. Murray*, 415 U.S. 61, 81 (1974).

⁸In his affidavit Singer stated, however, that he had not specifically authorized some of the newspaper publicity.

charge for "immoral conduct" and for possessing personality traits which rendered him "unsuitable for further Government employment". The employee was "competent" and doing "very good" work. He was dismissed solely because he had made an off-duty homosexual advance. The Commission found that this act amounted to "immoral, indecent, and disgraceful conduct", resulting in possible embarrassment to the employing agency. Relying on the First Amendment and the Due Process Clause the court held that the dismissal could not be sustained on the grounds relied on by the Commission, in that the employer agency had not demonstrated any "rational basis" for its conclusion that discharge would "promote the efficiency of the service". The court noted, however, that homosexual conduct cannot be ignored as a factor in determining fitness for federal employment since it might "bear on the efficiency of the service in a number of ways". More specifically the court said: "If an employee makes offensive overtures while on the job, or if his conduct is notorious, the reactions of other employees and of the public with whom he comes in contact in the performance of his official functions may be taken into account. Whether or not such potential consequences would justify removal, they are at least broadly relevant to 'the efficiency of the service.'" 417 F.2d at 1166.

The court concluded in *Norton*, 417 F.2d at 1167, that:

"A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service. Once the connection is established, then it is for the agency and the Commission to decide whether it outweighs the loss to the service of a particular competent employee.

"In the instant case appellee has shown us no such specific connection. Indeed, on the record appellant is at most an extremely infrequent offender, who neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public.⁹ Thus, even the potential for the embarrassment the agency fears is minimal. We think the unparticularized and unsubstantiated conclusion that such possible embarrassment threat-

⁹In a footnote the court noted that there was "no evidence that (Norton) was ever engaged in any offensive conduct in public. His private conduct came to light only through police investigation tactics of at least questionable legality". 417 F.2d at 1167, n. 27.

ens the quality of the agency's performance is an arbitrary ground for dismissal."

Norton v. Macy was construed by another panel of the Court of Appeals for the District of Columbia, in *Gayer v. Schlessinger*, 490 F.2d 740 (1973) in an opinion by Judge Fahy with Judge Leventhal concurring, and Judge Robb concurring in part and dissenting in part.¹⁰ The court concluded regarding *Norton* "Thus the court said in part that a rational connection between an employee's homosexual conduct and the efficiency of the service may exist" justifying agency personnel action. 490 F.2d at 750. The court noted (n. 21 p. 750) that judicial opinion on the issue was not unanimous since in *Anonymous v. Macy*, 398 F.2d 317, 318 (5 Cir. 1968) the court rejected the contention that homosexual acts of employees do not affect the efficiency of the service and may not be the basis of discharge.¹¹ The court in *Gayer* concluded that, "As in other decisions of importance the bearing of particular conduct must be left to a rational appraisal based on relevant facts"; that the determination of the government agency should be "explained in such manner that a reviewing court may be able to discern whether there is a rational connection between the facts relied upon and the conclusions reached"; that some deference must be accorded the decision of the agency; and that the "degree of this deference must be the result of a nice but not

¹⁰In *Gayer* the court considered three cases in which the district court had set aside the revocation of security clearance for homosexuals. Appellant relies upon two of those cases, *Wentworth v. Laird*, 348 F.Supp. 1153 (1972) and *Gayer v. Laird*, 332 F.Supp. 169 (1971). While the Court of Appeals affirmed the district court, it did so on the ground that in *Wentworth* the Hearing Examiner and Appeals Board had relied on answers to questions which were in violation of an executive order and thus impermissible, and in the second case the scope of examination was excessive. The orders were affirmed without prejudice to further proceedings by the Government consistent with the court's opinion. The third case (*Gayer*) was remanded to the administrative level to afford the employee an opportunity to respond to questions held proper, suspension to be sustained in case of his failure to answer the questions.

¹¹The court also considered the effect of prior decisions of the D. C. Circuit Court in *Adams v. Laird*, 420 F.2d 230 (1969), *cert. denied*, 397 U.S. 1039 (1970); *Dew v. Halaby*, 317 F.2d 582 (1973), *petition for cert. dismissed*, 379 U.S. 951 (1964); and *Scott v. Macy*, 402 F.2d 644 (1968), both majority and dissenting opinions.

—easily—definable weighing of the ingredients of which the particular case is comprised". 490 F.2d at 750-751.

In *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Cal. 1973), an organization of homosexual persons and a discharged employee brought an action to "challenge the United States Civil Service Commission's policy as stated in Federal Personnel Manual Supplement (Int.) 731-71, of excluding from government employment all persons who have engaged in or solicited others to engage in homosexual acts".¹² The court found that the decision of the Board of Appeals and Review was "based solely upon the fact that plaintiff is presently a homosexual person and the Commission's view that the employment of such persons will bring the government service into 'public contempt'". Following *Norton v. Macy*, the court held that the "Commission can discharge a person for immoral behavior only if that behavior actually impairs the efficiency of the service", and that the Commission had not met, or even tried to meet, this standard. 63 F.R.D. at 401. The court accordingly ordered reinstatement of the discharged employee and that the Commission "forthwith cease excluding or discharging from government service any homosexual person whom the Commission would deem unfit for government employment solely because the employment of such a person in the government service might bring that service into the type of public contempt which might reduce the government's ability to perform the public business with the essential respect and confidence of the citizens which it serves". 63 F.R.D. at 402.

The court recognized, however, that "granting this relief will not interfere with the power of the Commission to dismiss a person for homosexual conduct in those circumstances where more is involved than the Commission's unparticularized and unsubstantiated conclusion that possible embarrassment about an employee's homosexual conduct threatens the quality of the government's performance. Thus, although the overbroad rule stated in Federal Personnel Manual Supplement (Int.) 731-71 *supra*, n.1, cannot be

¹²The manual read in pertinent part:

"Homosexuality and Sexual Perversion—

Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment."

enforced, the Commission is free to consider what particular circumstances might justify dismissing an employee for charges relating to homosexual conduct."¹³ 63 F.R.D. at 401.

*Changes in Civil Service Regulations and
Personnel Manual*

At oral argument counsel called attention to changes in the Personnel Manual following *Society for Individual Rights v. Hampton*, which were set forth in a bulletin issued December 21, 1973,¹⁴ and also to amendments to the Civil Service Regulations relating to Suitability Disqualification, which became effective July 2, 1975¹⁵ following rule making proceedings initiated on December 3, 1973. The bulletin issued on December 21, 1973 was not made a part of the record in this case, and it does not appear that it was called

¹³Notice of appeal was given, but the appeal was later dismissed on motion of the Civil Service Commission.

¹⁴The bulletin called attention to the opinion in *Hampton*, noting that it was a class action and applicable to all federal employees. The Commission, therefore, instructed those "engaged in suitability evaluation" as follows:

"Accordingly, you may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service."

¹⁵ 5 C.F.R. Part 73, relating to Suitability Disqualification, was substantially amended. In the provision listing reasons for disqualification, the word "immoral" was deleted, Section 731.202(b), as amended reading in part: "(2) Criminal, dishonest, infamous or notoriously disgraceful conduct". The "Suitability Guidelines for Federal Employment" was revised to conform to the new regulations. The amended guidelines for determining "Infamous or Notoriously Disgraceful Conduct" reads in part:

"Individual sexual conduct will be considered under the guides discussed above. Court decisions require that persons not be disqualified from Federal employment solely on the basis of homosexual conduct. The Commission and agencies have been enjoined not to find a person unsuitable for Federal employment solely because that person is homosexual or has engaged in homosexual acts. Based upon these

to the attention of the district court. The new regulations were adopted subsequent to the entry of judgment and during the pendency of this appeal. Our decision in this case is based on the record before the district court and the regulations and guidelines in effect when appellant's contract was terminated.¹⁶

Reason for Termination of Employment

We conclude from a review of the record in its entirety that appellant's employment was not terminated because of his status as a homosexual or because of any private acts of sexual preference. The statements of the Commission's investigation division, hearing examiner, and Board of Appeals make it clear that the discharge was the result of appellant's "openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities", while identifying himself as a member of a federal agency. The Commission found that these activities were such that "general public knowledge thereof reflects discredit upon the Federal Government as his employer, impeding the efficiency of the service by lessening public confidence in the fitness of the Government to conduct the public business with which it was entrusted".

This case is factually distinguishable from *Norton v. Macy* and the other cases discussed *supra*, involving private sexual acts and considering situations where there was no showing that the discharge would "promote the efficiency of the service". It is apparent from their statements that the Commission and its officials appreciated the requirement of *Norton v. Macy*, decided three years earlier, that discharge of a homosexual must be justified by a finding that his conduct affected the efficiency of the service. As noted *supra*, *Norton v. Macy* recognized that notorious conduct and open flaunting and careless display of unorthodox sexual conduct in public might be relevant to the efficiency of the service. The Com-

court decisions and outstanding injunction, while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable for Federal employment where the evidence establishes that such person's sexual conduct affects job fitness."

¹⁶We do not imply that the amended regulations and guidelines would require a different result under the facts of this case.

mission set forth in detail the specified conduct upon which it relied in determining appellant's unsuitability for continued employment in the competitive Federal service. We are able to discern "a rational connection between the facts relied upon and the conclusions reached" (*Gayer v. Schlessinger, supra*) and agree with the district court that there was substantial evidence to support the findings and conclusions of the Civil Service Commission.

First Amendment Rights

With respect to appellant's contention that his First Amendment rights have been violated, appellant relies on two cases which deserve comment. The first of these cases, *Gay Students Org. of University of New Hampshire v. Bonner*, 509 F.2d 651 (1 Cir. 1974), did not involve public employment, but rather the validity of a regulation prohibiting a homosexual organization from holding social activities on the campus. The court concluded that "The GSO's efforts to organize the homosexual minority, 'educate' the public as to its plight, and obtain for it better treatment from individuals and from the government . . . represent but another example of the associational activity unequivocally singled out for protection in the very 'core' of association cases decided by the Supreme Court".¹⁷ In holding that "conduct may have a communicative content sufficient to bring it within the ambit of the First Amendment", the Court also recognized that "Communicative conduct is subject to regulation as to 'time, place and manner' in the furtherance of a substantial governmental interest, so long as the restrictions imposed are only so broad as required in order to further the interest and are unrelated to the content and subject matter of the message communicated." 509 F.2d at 660.

In *Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498 (4 Cir. 1974), the Board had transferred Acanfora to a nonteaching position when they found that he was a homosexual. The Board's action was upheld on the ground that Acanfora had deliberately withheld from his application information relating to his homosexuality. In holding, however, that Acanfora's public statements on homosexuality were protected by the First Amendment, the court recognized the balancing test set forth in *Pickering v. Board of Education, supra*, and continued:

¹⁷Citing, *inter alia*, *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama Ex rel. Patterson*, 357 U.S. 449 (1958).

"At the invitation of the Public Broadcasting System, Acanfora appeared with his parents on a program designed to help parents and homosexual children cope with the problems that confront them. Acanfora also consented to other television, radio, and press interviews. The transcripts of the television programs, which the district court found to be typical of all the interviews, disclose that he spoke about the difficulties homosexuals encounter, and, while he did not advocate homosexuality, he sought community acceptance. He also stressed that he had not, and would not, discuss his sexuality with the students.

"In short, the record discloses that press, radio, and television commentators considered homosexuality in general, and Acanfora's plight in particular, to be a matter of public interest about which reasonable people could differ, and Acanfora responded to their inquiries in a rational manner. There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said. We hold, therefore, that Acanfora's public statements were protected by the first amendment and that they do not justify either the action taken by the school system or the dismissal of his suit." 491 F.2d at 500.

Bonner and *Acanfora* are factually distinguishable. Neither involved the open and public flaunting or advocacy of homosexual conduct. Applying the balancing test of *Pickering v. Board of Education*, the Commission could properly conclude that under the facts of this case, the interest of the Government as an employer "in promoting the efficiency of the public service" outweighed the interest of its employee in exercising his First Amendment Rights through publicly flaunting and broadcasting his homosexual activities.

Affirmed.

JUDGMENT AND ORDER OF DISMISSAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOHN F. SINGER, and)	
other persons)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	No. 839-72C2
)	
UNITED STATES CIVIL)	JUDGMENT AND ORDER
SERVICE COMMISSION,)	OF DISMISSAL
et al.,)	
)	
Defendants)	
)	

THIS MATTER having come on regularly before this Court on the defendants' Motion for a Summary Judgment of Dismissal, the Court having reviewed the files and pleadings, the administrative record, and the briefs of the parties, and having concluded that there is substantial evidence in the administrative record to support the findings and conclusions of the defendant Civil Service Commission, now, therefore, it is

ORDERED, ADJUDGED, AND DECREED that the defendants have summary judgment of dismissal and this case should be and is hereby dismissed with prejudice.

DATED this 29th day of March, 1974

/s/ Walter T. McGovern
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON 98104

Walter T. McGovern

Judge

March 28, 1974

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Gentlemen and Miss Howell:

RE: John F. Singer, and other persons
similarly situated

v.

United States Civil Service Commis-
sion; Robert E. Hampton, Chairman,
United States Civil Service Commis-
sion; William P. Berzak, Chairman,
United States Civil Service Commis-
sion Board of Appeals and Review;

William G. Wendell, Director,
Seattle Regional Office, United
States Civil Service Commission
WD Cause No. 839-72C2

Judge McGovern has reviewed the file and has concluded that there was substantial compliance by the administrative agency involved in consideration of John Singer's discharge from the Civil Service Commission, and has concluded that there was substantial evidence to support the agency's findings and conclusions.

Accordingly, the Court will grant the defendants' Motion for Summary Judgment.

Attorney for the Defendant will, therefore, present for Judge McGovern's signature the appropriate Findings, Conclusions and Judgment.

Very truly yours,

NADINE SCOTT
Law Clerk Intern

cc: Clerks Office

NS/jnb

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D.C. 20415

D E C I S I O N

IN THE MATTER OF)
) TYPE CASE: Suitability
John F. Singer)

INTRODUCTION

Appellant, named above, through his attorney, Christopher E. Young, appealed to the Board of Appeals and Review by letter dated September 20, 1972 from a decision of the Commission's Seattle Regional Office. The Region's decision affirmed an original finding that appellant does not meet the suitability requirements for employment in the competitive Federal service under the provisions of Section 731.201 of the Civil Service Regulations.

STATEMENT OF THE CASE

Appellant entered on duty with the Equal Employment Opportunity Commission at Seattle, Washington, as a Clerk-Typist, GS-4, effective August 2, 1971, subject to satisfactory investigation.

During the course of investigation information was developed which raised a question whether appellant meets the suitability requirements for competitive Federal employ-

ment. Appellant was accorded a special interview with a Commission representative on May 19, 1972, at which time he was acquainted with the questionable information and given an opportunity to furnish information in explanation or in refutation. After consideration of all the information including that furnished at the special interview, an initial determination was made that appellant did not meet the suitability standards for employment.

FIRST LEVEL DECISION

The determination of the Regional Office informed the appellant as to the specific reasons on which his disqualification was based. As a result of the unfavorable determination the Region instructed appellant's removal from employment and cancelled any pending applications or existing eligibilities.

The Regional Office, by decision letter dated September 14, 1972, informed appellant that as a result of a review of the facts in the case there was no basis to modify or reverse the original findings and therefore the previous determination was sustained.

REPRESENTATIONS TO THE BOARD OF APPEALS AND REVIEW

In the letter of appeal to the Board, appellant reiterates the same representa-

tions presented in the appeal to the Regional Office. In addition thereto, the appellant contends that the letter of April 10, 1972, cited in the Regional Office's decision, was written in response to a request from the Commission's Seattle Regional Training Center to all Federal employees asking for members of minority groups to volunteer to participate in training sessions designed to help Federal employees become sensitized to the problems of minorities. The appellant is apparently attempting to refute a finding that he has sought publicity concerning his life style.

ANALYSIS AND FINDINGS

The Board of Appeals and Review has given careful consideration to the entire appellate record as presented and developed in the Commission's Seattle Region and as further presented by the appellant in his submissions to the Board.

The record shows that appellant is a homosexual and that he openly professes his homosexuality and has received widespread publicity in this respect in at least two states. During the interview of May 19, 1972, the appellant was apprised of specific details concerning his homosexual activities and invited to comment on these matters. His only response was contained in his affidavit of May 26, 1972, which does not deny, explain, rebut or controvert the matters presented.

There is evidence in the file which indicates that appellant's actions establish that he has engaged in immoral and notoriously disgraceful conduct, openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities. Activities of the type he has engaged in are such that general public knowledge thereof reflects discredit upon the Federal Government as his employer, impeding the efficiency of the service by lessening general public confidence in the fitness of the Government to conduct the public business with which it is entrusted.

DECISION

Based on the record information the Board has concluded that in light of the established standards of suitability for competitive Federal employment the determination of the Commission's Seattle Region was not arbitrary or unreasonable but was required. Accordingly, the determination of the Commission's Seattle Regional Office issued under date of September 14, 1972 is affirmed by the Board of Appeals and Review.

For the Commissioners:

/s/ William P. Berzak
William P. Berzak
Chairman

December 1, 1972